Supreme Court, U.S.
FILED

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No. 08-675

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In The
Supreme Court of the United States

TADASHI DEMETRIUS KEYES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTIONS PRESENTED

1. DID THE FOURTH CIRCUIT COURT OF APPEALS ERR BY NOT DECLARING ERROR AND REVERSING OR REMANDING IN THAT THE UNITED STATES DISTRICT COURT COMMITTED ERROR IN ITS REMAND SENTENCING IN AGAIN APPLYING THE MURDER-CROSS REFERENCE TO THE DEFENDANT'S SENTENCE BECAUSE MURDER WAS NEITHER CHARGED IN THE INDICTMENT NOR FOUND BY A JURY BEYOND A REASONABLE DOUBT AS TO THE DEFENDANT KEYES AGAINST THE DEFENDANT'S SIXTH AMENDMENT RIGHTS?

2. DID THE FOURTH CIRCUIT COURT OF APPEALS ERR BY NOT DECLARING ERROR AND REVERSING OR REMANDING IN THAT THE UNITED STATES DISTRICT COURT COMMITTED ERROR AGAIN IN ITS REMAND SENTENCING APPLYING AN ENHANCEMENT FOR OBSTRUCTION OF JUSTICE BECAUSE IT WAS BASED ON JUDICIAL FACT-FINDING ALONE AND THE DEFENDANT'S PLEA OF NOT GUILTY FOR WHICH HE HAD A CONSTITUTIONAL RIGHT TO PLEAD?

3. DID THE FOURTH CIRCUIT COURT OF APPEALS ERR BY NOT DECLARING ERROR AND REVERSING OR REMANDING IN THAT THE UNITED STATES DISTRICT COURT AGAIN IN ITS REMAND SENTENCING COMMITTED ERROR IN IMPOSED A SENTENCE THAT WAS LONGER THAN THE TERM OF IMPRISONMENT

THAT THE DISTRICT COURT COULD HAVE IMPOSED BASED SOLELY ON THE JURY'S FINDINGS?

4. DID THE FOURTH CIRCUIT COURT OF APPEALS ERR BY NOT FINDING THAT THE DISTRICT COURT COMMITTED ERROR IN THE REMAND SENTENCING BY NOT FOLLOWING THE INSTRUCTIONS OF THE COURT OF APPEALS WHEN IT REMANDED THE CASE FOR RE-SENTENCING AND THE DISTRICT COURT IMPOSED THE EXACT SAME SENTENCE AS BEFORE, WITHOUT EXPLANATION?

5. DID THE FOURTH CIRCUIT COURT OF APPEALS ERR BY NOT FINDING THAT THE DISTRICT COURT COMMITTED ERROR IN ITS REMAND SENTENCING BY NOT EXPLAINING FOR THE RECORD AND FOR THE DEFENSE OF HOW A PREPONDERANCE OF THE EVIDENCE WAS DETERMINED AND CONCLUDED BY THE COURT IN HANDING DOWN THE EXACT SAME SENTENCE AS BEFORE REMAND?

6. DID THE FOURTH CIRCUIT COURT OF APPEALS ERR BY NOT FINDING THAT THE DISTRICT COURT COMMITTED ERROR IN ITS REMAND SENTENCING BY NOT RECALCULATING THE GUIDELINES AND FAILING TO GIVE DEFENSE COUNSEL THE OPPORTUNITY TO REVIEW NEW GUIDELINE SHEETS PRIOR TO THE RE-SENTENCING HEARING AND FAILING TO HAVE AN AMENDED PRE-SENTENCE REPORT PRODUCED?

7. DID THE FOURTH CIRCUIT COURT OF APPEALS ERR BY NOT FINDING THAT THE DISTRICT COURT COMMITTED ERROR IN ITS REMAND SENTENCING BY AGAIN MAKING A JUDICIAL DECISION AND DETERMINATION OF THE AMOUNT OF THE DRUGS IN QUESTION FROM THE PRE-SENTENCE REPORT FOR THE ORIGINAL SENTENCING AND NOT FROM ANY FACT FINDING BY A JURY, THERE NEVER BEING A JURY DETERMINATION OF THE SPECIFIC AMOUNT OF DRUGS ATTRIBUTED TO THE DEFENDANT AND THE AMOUNT OF 50 GRAMS FOUND BY THE COURT CAME SOLELY FROM A PRE-SENTENCE REPORT?

8. HAS THIS APPELLANT'S SIXTH AMENDMENT RIGHT TO CHOOSE AN IMPARTIAL JURY TO HEAR AND DECIDE THE FACTS OF THE CASE AGAINST HIM BEEN DENIED, ABROGATED AND USURPED BY PREVAILING CASE LAW WHICH ALLOWED THE JUDGE IN THIS CASE TO DECIDE FACTS NOT ADMITTED AND NOT PRESENTED TO A JURY AND NOT INCLUDED IN AN INDICTMENT BASED ON THE JUDGE'S OWN FINDING THAT A PREPONDERANCE OF THE EVIDENCE EXISTS TO ADD ENHANCEMENTS TO THE SENTENCING BASED ON CROSS-REFERENCES?

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The opinion and disposition by the Fourth Circuit Court of Appeals to Appellant's Petition for Remand was not published and is annexed hereto. (Appx. 1a-5a) The unpublished opinion was given the designation of record number 07-5108.

JURISDICTION

The order of the United States Court of Appeals for the Fourth Circuit denying the Appellant's PETITION TO REHEAR and thereby affirming the District Court's ruling was decided on July 17, 2008 and the Order entered on August 26, 2008.. That opinion is unpublished No. 07-5108. (Appx. pgs. 1a-5a) This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254, 1257, Petitioner having asserted below and asserting herein deprivation of rights secured by the United States Constitution. The appeal to the United States Court of Appeals for the Fourth Circuit was timely and duly filed in response to the judgment of the U. S. District Court for the Western District of Virginia. This Petition for a WRIT OF CERTIORARI is duly and timely filed within ninety (90) days of that date.

The United States District Court had correct jurisdiction in that the appellant was charged under United States statutes. Appellate jurisdiction existed with the Fourth Circuit Court of Appeals because the judgment of the District Court was final as to his conviction under all Counts of the indictment.

CONSTITUTIONAL PROVISION INVOLVED

1. This case involves the Eighth Amendment to the United States Constitution, which provides:

> "Excessive bail shall not be required, nor excessive fine imposed nor cruel and unusual punishments inflicted."

2. This case involves the Fifth Amendment to the United States Constitution, which provides:

> "No person shall be held to answer for a capital or otherwise infamous crime...nor be deprived of life, liberty or property without due process of law."

3. This case involves the Sixth Amendment to the United States Constitution, which provides:

> "In all criminal prosecution, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

STATEMENT OF THE CASE

The Fourth Circuit Court of Appeals granted a remand in part in this case on February 7, 2006, (Appx. p. 6a) on the following grounds:

1. That the District Court erred in applying the murder-cross reference to Keyes' sentence because murder was neither charged in the indictment, confessed, nor found by a jury beyond a reasonable doubt as to Keyes.

2. That the District Court erred in applying an enhancement for obstruction of justice because it was based on judicial fact-finding alone.

3. That the Court of Appeals found that the errors affected Keyes' substantial rights because the sentence imposed was longer than the term of imprisonment that the District Court could have imposed based solely on the jury's findings.

The Court of Appeals, in its findings, decided on February 7, 2006, leading to the remand of sentencing, stated: "On remand, the District Court should first determine the appropriate sentencing range under the guidelines, making all factual findings appropriate for that determination."

Pursuant to those findings by the Court of Appeals, the sentencing was vacated, for defendant Keyes, and the case remanded for resentencing. At resentencing, the District Court imposed exactly the same sentence, as before the remand, without comment. At resentencing, the Court never ordered

an amended presentence report and never recalculated the guidelines prior to resentencing.

ARGUMENT

The spirit and dictates of Booker and its progeny were not followed by the findings of the District Court in the Remand Sentencing hearing.

At the Remand Sentencing Hearing, on October 31, 2007, the Court failed to explain how a preponderance of the evidence was concluded by the Court to exist to support the enhancement adjustments which had failed the test of Booker in that the facts supporting same were never considered by a jury.

The District Court stated, on page 4 of the Remand Sentencing transcript, the following:

> "So the Court makes the finding for the sentencing purpose that the total offense level is 43 and the criminal history category is II.
>
> I find...I make the finding that those facts are proven by a preponderance of the evidence necessary for those adjustments."

The Court failed to explain at all its election to sentence exactly as before notwithstanding the dictates under the remand from the Court of Appeals and especially as to why the cross-reference for murder was applicable in this case to defendant

Keyes. (The Fourth Circuit opinion decided on February 7, 2006 clearly asks the mandates the trial Court to hand down a sentence "within the prescribed range and reasonable". Under the facts of this case, the remand sentencing was simply not reasonable.

Under Justice Stevens' opinion in Booker, pursuant to the Sixth Amendment, the Government must prove beyond a reasonable doubt the facts necessary to support a sentencing enhancement. United States v. Booker, 543 U.S. 220, 125 S. Ct. 738, 749, 169 L. Ed. 2d 621 (2005).

In the Court of Appeals' decision on the Appellant's Appeal on the Remand Sentencing, it was concluded that the murder of Michie by Felton was "reasonably foreseeable" by Keyes. There just are no facts in this case that support that conclusion.

To illustrate with a hypothetical, a person may have one of their guns stolen from them and tell another person the gun was stolen. They may even tell them who they believe stole the gun. If the suspected gun thief gets murdered, there is no duty or expectation that the party to whom the information was passed would know the alleged thief of the gun would be murdered.

Defendant Keyes should not be held to the requisite element of possible foreseeability that Felton would kill Michie over a stolen gun or guns or for any reason. How would Keyes know? Even if Keyes considered that as a possibility, what duty did he have to prevent it and how could he have

prevented it? The cross-reference enhancement for the murder for which Keyes had absolutely no part in, was never charged with committing and having no prior knowledge about should be vacated.

In U.S. v. Pauley, 289 F.3d 254, 258 (4th Cir. 2002), on a similar murder cross-reference issue, it was decided that whether a particular cross-reference should be applied depends on whether the conduct to which the cross-reference refers is "relevant conduct" as defined in Section 1B1.3. In the instant case, the murder Count was not part of the same acts and in furtherance of the alleged drug conspiracy and should not be found to be relevant conduct resulting in cross-referencing at sentencing.

Notwithstanding only Booker, sentencing under the guideline for homicide, namely § 2A1.1, must be proven by a preponderance of the evidence and must be found by the trier of fact beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). The District Court never stated, during the Remand Sentencing Hearing, that it had found the Appellant guilty beyond a reasonable doubt in order to apply the cross-reference of the murder of Michie, for which this Appellant had never been charged or indicted. The guidelines provide a cross-reference to the murder guideline where a homicide occurs during the course of another offense. There was no proof or even stipulation that another offense was occurring when Michie was murdered...and no proof that Keyes benefited or even knew that the killing would occur.

The Court of Appeals did not address the issue of the District Court making a judicial decision and determination of the amount of the drugs, (which the Court set at 50 grams) at sentencing solely from the pre-sentence report and not from any fact finding by a jury. The cross-reference enhancement to a base level of 43 by the District Court, in the first and second sentencing hearings, was in direct conflict with recent findings in Booker, as well as those cases leading to Booker, and must therefore be vacated.

The District Court stated without explanation that the Guidelines would be followed and the sentencing would be as before. The Court failed to recalculate the Guidelines. No amended presentence report was produced and the Court did not explain the correctness of the range used.

The Guidelines were not recalculated prior to the remand sentencing hearing. Again, and importantly, no guideline sheets were provided and your Appellant alleges that the guidelines were therefore improperly calculated because they were not done prior to the sentencing hearing.

The Court of Appeals did not address the issue of the enhancement for Obstruction of Justice. This enhancement, too, should be vacated in that it was never given to a jury and was determined solely by judicial fact finding. There is absolutely no evidence found in the transcripts of this case that are sufficient to support a preponderance finding by the Court of the enhancements added to the sentencing of your Appellant.

Booker holds that "any fact other than a prior conviction which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved by a jury beyond a reasonable doubt." 543 U.S. at 224.

This was the rationale by the Court of Appeals in its remand of the sentencing in this case. However, exactly the same errors occurred, to the Appellant's great detriment, at the re-sentencing hearing. These errors affected the Appellant's substantial rights in that the errors affected the outcome of the proceeding. See, United States v. Stokes, 261 F.3d 496, 499 (4th Cir. 2001)

Post Booker, there have been a plethora of cases heard and decided, with telling and applicable relevance to our instant case. In U.S. v. Aloysius T. Fokkoun-Ngassa, 2007 U.S. App. Lexis 25818, like Keyes, the defendant's sentence was enhanced based on uncharged conduct. The Court agreed that the conduct could be considered as long as the conduct is "proven by a preponderance of the evidence". The District Court failed to offer any explanation what basis it had to determine or what indeed it based its decision in determining a preponderance of the evidence existed or what that evidence may have been. This silence by the Court should abrogate its summary decision that a preponderance of evidence did exist to allow the cross-reference for the murder of Michie by Felton to stand. This same argument stands in regard to the cross-reference for obstruction of justice which from all indications in

the record was simply imposed due to the Defendant pleading not-guilty.

The Sixth Amendment errors occurred, yet again, at the remand re-sentencing in that the District Court imposed a sentence exceeding the maximum allowed based on facts admitted, (which were none) or facts established by a jury, which also were non-existent. The entire sentencing was based on the Court's interpretation of the facts of the case creating a preponderance of evidence but this was never delineated by the Court or explained in any fashion to the detriment and injustice to your Appellant. See, Herbert James Henry, Jr. v. United States, 2008 U.S. Dist. LEXIS 14877 (February 27, 2008) The spirit of Booker and its progeny was not well served in this sentencing.

Our Fourth Circuit Court of Appeals held, also subsequent to Booker, the following in United States v. George Keith Martin, 2008 U.S. App. LEXIS 723 (Decided January 14, 2008), to wit:

> "A reviewing court examines a post-Booker sentence for unreasonableness. A sentence may be unreasonable for both substantive and procedural reasons. A substantially unreasonably sentence occurs when a district court relies on an improper factor or rejects policies articulated by Congress or the Sentencing Commission and a procedurally unreasonable sentence occurs when the district court provides an inadequate statement of reasons or

> fails to make a necessary factual finding."

Your Appellant avers that the District Court did indeed and again, in the second sentencing, failed to provide an adequate statement of reasons and failed to make a necessary factual finding when it concluded, without comment, a preponderance of evidence was extant...did exist for the Court to make its conclusion in reference to the enhancement of the cross-reference for the murder of Michie and for the obstruction of justice. Additionally and very important to this case, the Court failed to make a necessary factual finding in its determination that 50 grams of cocaine should be charged to defendant Keyes, based solely on the unreliable and unsubstantiated report appearing in the first and only pre-sentence report. (No new or amended pre-sentence report was prepared for the second sentencing hearing.) The District Court failed to make specific findings as to whether the drug amount was reasonably foreseeable to defendant Keyes to be within the specific and admitted or proven agreement of the alleged conspiracy and instead blindly applied the amount stated in the first pre-sentence report. (See, e.g., United States v. Howard J. Beard, Court of Appeals for the Fourth Circuit, 232 Fed. Appx. 368; 2007 U.S. App. LEXIS 16682 (Decided July 12, 2007.) The enhancements are, therefore, in violation of your Appellant's Sixth Amendment Rights.

CONCLUSION

Prevailing case law notwithstanding, it is an egregious violation of this or any appellant's Sixth Amendment Right to choose to have a trial by a jury and have that jury decide all the facts in the case against him. To allow the judge in this case to decide and impose enhancements to the sentencing based on issues not admitted, not charged and not included in an indictment simply by the judge alone deciding if there exists a mere preponderance of evidence to support same...without explanation. This bifurcated the adjudication of this Appellant...part by jury and part by judge...and led to an outcome that flies in the face of Constitutional guarantees of a fair and impartial trial for any American by a jury of his peers if he so chooses and this Appellant did so choose. This right is sacrosanct and should not have been violated in this or any case before our Courts.

For the foregoing reasons and upon the foregoing authorities, your Appellant respectfully petitions for a reduction in this Appellant's sentencing or a remand of same for a new sentencing hearing.

Respectfully Submitted,

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